No. 80-402

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In the Supreme Court of the United States

OCTOBER TERM, 1980

J. P. STEVENS & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board reasonably exercised its remedial authority in ordering petitioner to accord union representatives access to all of its plants for a two-year period, to promptly notify the union and provide relevant information concerning impending corporate-wide benefit changes, and to bargain in good faith regarding similar or identical contemplated changes for employees in the bargaining unit represented by the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A141-A153) is reported at 623 F. 2d 322. The decision and order of the National Labor Relations Board (Pet. A1-A140) are reported at 239 N.L.R.B. 738.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1980. The petition for a writ of certiorari was filed on September 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at pages 2-3 of the petition.

STATEMENT

1. In September 1974, the Union[1] was certified by the Board to represent petitioner's 3,000 employees at Roanoke Rapids, North Carolina (Pet. App. A12, A13). Collective bargaining negotiations between petitioner and the Union commenced in October 1974, and continued for the next two years without the parties' reaching an agreement (Pet. App. A48, A92). Based on charges filed by the Union, the Board found that petitioner, during the negotiations, committed several unfair labor practices, in violation of Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5). Thus, petitioner made three separate unilateral changes in terms and conditions of employment and refused on three occasions to furnish relevant information to the Union in a timely fashion (Pet. App. A14-A23, A27-A41). In addition, between

[1]Amalgamated Clothing and Textile Workers Union, AFL-CIO.

January 1975 and December 1976, petitioner employed a "bargaining strategy" with respect to corporate-wide changes in its profit-sharing and group insurance plans and two corporate-wide wage increases, whereby petitioner would unilaterally announce such changes without having notified the Union and without permitting any meaningful negotiation concerning their possible implementation at the Roanoke Rapids facility (Pet. App. A2-A3). The Board also found, based upon the totality of petitioner's conduct, that petitioner had further violated Section 8(a)(5) of the Act by refusing to bargain in good faith with the Union for a collective bargaining agreement since October 1974. In so concluding, the Board relied in part on petitioner's long-standing, unabated hostility toward the Union, and on the antiunion speeches made by petitioner's representatives during Union campaigns at other plants in which petitioner used the failure of the Roanoke Rapids negotiations to demonstrate the futility of selecting the Union (Pet. App. A92-A117).

As a remedy for these unfair labor practices, which petitioner does not now challenge, the Board issued an order requiring petitioner not only to cease and desist from the various unfair labor practices and to post a notice at Roanoke Rapids and petitioner's other plants, but also, *inter alia*, to take the following action at each of its plants for a two-year period (Pet. App. A3-A4, A134-A136):

> (h) Upon request of the Union, * * * immediately grant the Union and its representatives reasonable access to the plant bulletin boards and all places where notices to employees are customarily posted, * * * for a period of 1 year from the date of request.
>
> (i) In the event * * * [petitioner] convenes any group of employees at any of [its] plants and

addresses them on the question of union representation, give the Union reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such speech, and, upon request of said representatives, permit one of them to address the employees for the same amount of time as [petitioner's] address.

(j) If * * * the Board schedules an election in which the Union participates at any of [petitioner's] plants, then, upon request by the Union, afford at least two Union representatives reasonable access to each of [those] plants and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be within 10 working days before but not within 48 hours prior to any such election.

* * * * *

(l) * * * upon request of the Union, without delay, permit a reasonable number of Union representatives access for reasonable periods of time to all its canteens, rest and other non-work areas, including parking lots, within each of its plants, for the purpose of communicating orally and in writing with the employees in such areas during changes of shift, breaks, mealtimes or other non-work periods. * * *

In explaining the necessity for corporate-wide access remedies, the Board stated (Pet. App. A121-A122; footnote omitted):

[I]n speeches in three states, [petitioner] attempted, no doubt with some success, to chill the ardor of employees for the Union by gloating about the Union's utter lack of progress at the organized plants, a lack of progress found here to be attributable to a

> resolve to defy the statute. It can scarcely be doubted that the eyes of all [of petitioner's] employees are turned to Roanoke Rapids, the only location at which the Union has secured representation rights through an election victory, for some signal that [petitioner] is willing to respect the spirit of the law at long last. When [petitioner] instead gears up its resistance, and actually flaunts its intransigence at the bargaining table as a new weapon in "its now all too familiar pursuance of full-scale war against unionization," * * * remedies reaching the length and breadth of its enterprise are imperative.

Accordingly, and in light of petitioner's "promiscuous retailing at other facilities of its illicit conduct at Roanoke Rapids" (Pet. App. A124), the Board concluded that it would be "appropriate to afford the Union * * * access to all plants * * * in the hope that the Union will in some measure be able to counteract the predictably adverse emanations which have flowed from what is now more than three years of fruitless bargaining at Roanoke Rapids" (*ibid.*).

The Board also directed petitioner to (Pet. App. A4):

> (c) Give prompt notice to the Union of [its] decision to announce or institute systemwide changes in employee benefits; produce upon request all information relevant thereto for purposes of collective bargaining, prior to announcement or implementation of such changes in benefits on a companywide basis; and afford the Union an opportunity effectively to negotiate regarding similar or identical contemplated changes in such employee benefits for the bargaining unit at the Roanoke Rapids plant.

This remedy was "directed specifically" at petitioner's "tactic * * * of developing comprehensive improvements in corporate-wide benefit programs, keeping the Union in the dark regarding information necessary and relevant for purposes of collective bargaining, and timing the announcement or implementation of these changes to preclude any meaningful negotiation concerning their possible implementation at the Roanoke Rapids facility" (Pet. App. A2-A3). The Board concluded that such remedial action was necessary because petitioner's "tactic was a most effective means of undermining the collective-bargaining process and denigrating the Union's status as collective-bargaining agent [–] * * * violations go[ing] to the very heart of the Act and our national policy" (Pet. App. A3).

Finally, the Board ordered petitioner to reimburse the Board and the Union for their reasonable litigation costs and expenses, and to reimburse the Union for the reasonable costs of engaging in collective bargaining negotiations (Pet. App. A127-A136). With regard to litigation expenses, the Board adopted the administrative law judge's findings (Pet. App. A127, A129) that petitioner, in "bad faith," engaged in "willful and persistent defiance of the law" and that the defenses asserted by petitioner did not constitute "debatable" issues within the contemplation of the Board's decision in *Heck's, Inc.*, 215 N.L.R.B. 765 (1974) (following remand from *NLRB* v. *Food Store Employees Union*, 417 U.S. 1 (1974)).[2] Similarly, with respect to negotiation expenses, the Board adopted the administrative law judge's finding (Pet. App. A130) that "the monies wasted by the Union in

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[2]In *Heck's, Inc., supra,* 215 N.L.R.B. at 767, the Board expressed its "intent to refrain from assessing litigation expenses * * * where the defenses raised * * * are 'debatable' rather than 'frivolous.' "

bargaining were a direct and proximate product of [petitioner's] willful defiance of its statutory obligation * * * and compensation therefor would simply restore the *status quo ante*."

2. With one exception, the court of appeals sustained the Board's findings and conclusions and enforced the Board's order. First, the court of appeals rejected petitioner's contention that the Union access remedies were unrelated to the violations found by the Board and were therefore punitive. The court stated (Pet. App. A147-A148):

> This provision of the Board's order is predicated on its finding that the [petitioner] employed its unlawful bargaining strategy to chill the union's organization of other plants. The notice and access order is designed to counteract the use [petitioner] has made at other plants of its unfair labor practices in bargaining at Roanoke Rapids. Therefore the order is not punitive. It is designed to "effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943); *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 12 (1940).

The court of appeals also upheld the portion of the Board's order requiring petitioner to give prompt notice of impending systemwide changes, furnish relevant bargaining information, and bargain with the Union regarding similar changes contemplated at Roanoke Rapids. The court found no support for petitioner's assertion that this provision "require[d] it to bargain over benefits for unrepresented employees" (Pet. App. A148). The court explained (*ibid.*):

> The order is specifically limited to the Roanoke Rapids plant. If, as a result of bargaining, a company

> proposal is modified, nothing in the order requires the modified version to be implemented at plants where the union is not the bargaining representative. [Petitioner] retains the option to adopt or reject the results of bargaining at its other plants.

The court concluded, however, that the Board's award of reasonable litigation and negotiation expenses was not sufficiently explained and that the basis for the award was uncertain (Pet. App. A148-A152). The court pointed out that the ALJ had not specifically found that petitioner's defenses were frivolous within the meaning of the *Heck's, Inc.* decision (Pet. App. A149-A150). In addition, the court questioned whether the Board had enunciated a new policy of awarding fees and expenses on the basis of repeated egregious misconduct (*id.* at A151-A152). Accordingly, the court remanded this aspect of the Board's order to permit the Board to "explicate more fully its reasons for requiring reimbursement in this case" (*id.* at A152).

ARGUMENT

1. Petitioner challenges (Pet. 6-12) the Union access provisions of the Board's order on essentially the same grounds as it challenged a similar access order in *J.P. Stevens & Co.* v. *NLRB,* cert. denied, No. 79-1637 (Oct. 20, 1980).[3] For the reasons set forth in the Board's Brief in Opposition in No. 79-1637 (at 5-9), the arguments advanced by petitioner do not warrant review of the Board's access order in this case any more than they did

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[3]In No. 79-1637, the Board has ordered such union access as a remedy for violations of Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), which the Company committed during the Union's organizing campaign at petitioner's Tifton, Georgia, plant.

in No. 79-1637.[4] Likewise, and notwithstanding petitioner's claims to the contrary (Pet. 7-9), for the reasons stated in the Board's Supplemental Memorandum in No. 79-1637, there is no conflict between the decision

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[4]On October 19, 1980, petitioner and the Union entered into an agreement whereby petitioner agreed, *inter alia*, to execute the collective bargaining contract recommended by the bargaining committee at the Roanoke Rapids plant if it were ratified by the Union members in the bargaining unit; to pay to each employee in the Roanoke Rapids bargaining unit an amount equal to the accumulated additional wages which each such employee would have received had the wage increases agreed upon in the 1979 and 1980 negotiations been made effective then; and, if petitioner decides to improve its existing, or to institute a new, corporate-wide employee benefit plan, to notify the Union of the decision, and to afford it at least 15 days to discuss the pending improvement or innovation. BNA Daily Labor Report No. 204, D-1 to D-3 (Oct. 20, 1980). The Union, in turn, agreed, *inter alia*, that, for a period of 1-1/2 years, it would not utilize at any of petitioner's plants any of the following remedies afforded by any existing or future Board or court decision: "access to bulletin boards; the receipt of notice and the opportunity to be present if any group of employees are addressed on the issue of union representation; access to deliver a speech to employees prior to any election; the receipt of lists of employees, except for lists provided pursuant to an election scheduled by the NLRB; access to non-work areas." *Id.* at D-2, para. 5. The agreement further provides that, at the end of such 1-1/2 year period, "the Union shall be free to exercise any of the foregoing remedies for the remaining portion of any period during which the Company is legally obligated to provide such remedies." *Ibid.*

The Union's agreement to forego use of access remedies for a 1-1/2 year period does not affect the Board's power to continue enforcement of those remedies in this case. The Board vindicates public, and not private, rights, and its power to remedy unfair labor practices cannot be limited by a private agreement. See 29 U.S.C. 160(a). Nor does the Union's "waiver" obviate the possible future need for the access remedies provided by the Board. The access remedies are viable for 2 years, and the agreement leaves the Union free to utilize such remedies at the end of the 1-1/2 year period. Although this agreement therefore does not moot this controversy, it may as a practical matter substantially lessen the impact of the Board's access order in this case.

below and the decision in *Florida Steel Corp.* v. *NLRB*, 620 F. 2d 79 (5th Cir. 1980).

Indeed, the access order in this case, unlike the order in *Florida Steel*,[5] is premised on the concurrent finding of the Board and the court of appeals that petitioner used its bargaining violations at an organized plant as propaganda in its campaign to chill unionization at its unorganized plants. Petitioner has engaged in a pattern of bad faith bargaining spanning a period of two years in a unit of some 3,000 employees, the first unit of petitioner's employees to vote in a Board-conducted election in favor of unionization. Thus, as noted by the Board (Pet. App. A121-A122), Roanoke Rapids is quite naturally the focal point of attention among petitioner's unorganized employees, and the inevitable publicity attracted by petitioner's unlawful practices at Roanoke Rapids was compounded by its affirmative effort to "put that misconduct to its best advantage" by "gloating," through speeches delivered to employees in three states, "about the Union's utter lack of progress at the organized plants"—a lack of progress caused in part by petitioner's refusal to bargain in good faith. In short, it is not petitioner's long history of widespread unfair labor practices,[6] standing alone, which is the basis for the Board's access order, but rather, petitioner's "flaunt[ing of] its intransigence at the bargaining table [in this case] as a new weapon in 'its now

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[5] In *Florida Steel*, the court refused to enforce a broad union access order regarding both represented and unrepresented plants, which the Board had issued as a remedy solely for the employer's refusal to furnish information to the union at one of the represented plants. The Fifth Circuit expressly reserved decision on "[w]hether such access might be properly ordered in other circumstances * * *" (620 F. 2d at 83).

[6] That history is summarized in the Board's Brief in Opposition in No. 79-1637 (at 6-7 & nn.7, 8).

all too familiar pursuance of full-scale war against unionization' " (Pet. App. A122). Accordingly, here, the Board could reasonably conclude that one "unwholesome effect" of petitioner's refusal to bargain at Roanoke Rapids was to "chill the ardor" of its unorganized employees for the Union, and that this could be remedied only by affording the Union access to all of petitioner's plants. See *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704 (1944).[7]

2. Contrary to petitioner's assertion (Pet. 12-17), the requirement of the Board's order that petitioner notify and provide relevant information to the Union about any decision to announce or institute a corporate-wide benefit change does not impose a corresponding obligation to bargain with the Union about the decision to change benefits for unorganized employees. Rather, this provision is designed solely to permit meaningful bargaining by the Union "regarding similar or identical contemplated changes * * * at the Roanoke Rapids plant" (Pet. App. A4).[8] In addition, nothing in the order

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[7]As we explained in our Brief in Opposition in No. 79-1637 (at 8-9), petitioner's reliance (Pet. 10-11) on *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), is misplaced. Moreover, to the extent that petitioner contends (Pet. 10-12) that the Board's access order trenches on constitutionally protected property rights, its claim is without merit. See, *e.g.*, *Hudgens* v. *NLRB*, 424 U.S. 507, 521-523 (1976). In any event, petitioner failed to raise this claim before the Board and did not raise it in the court of appeals. Accordingly, this contention is not properly before the Court. See *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 n.10 (1979); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); 29 U.S.C. 160(e).

[8]The Board found that in each instance that corporate-wide benefit changes were implemented during the two-year period in issue, petitioner had contemplated implementing at Roanoke Rapids benefit changes identical to those instituted at the unrepresented

requires petitioner to offer the same benefits to the Roanoke Rapids plant.[9] And, as the court of appeals correctly observed (Pet. App. A148), if, as a result of bargaining at the Roanoke Rapids plant, "a company proposal is modified, nothing in the order requires the modified version to be implemented at plants where the union is not the bargaining representative."

3. Petitioner also contends (Pet. 17-20) that the Board's order is unlawful insofar as it requires that petitioner reimburse the Union for litigation and negotiation expenses. But, although the Board ordered such relief, the court of appeals denied enforcement of that portion of the Board's order and remanded the reimbursement issues to the Board for further explication of the basis for the Board's order. On remand, in light of the court of appeals' analysis, the Board might decide that either or both reimbursement provisions are unwarranted. In that event, the issue would become moot. On the other hand, should the Board again order reimbursement and should the court of appeals sustain the Board's reimbursement order,

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plants, in part to fulfill its campaign promises at other plants that employees represented by the Union would fare no better than unrepresented employees (Pet. App. A95). To guarantee the Union's acceptance of its benefit changes without modification at Roanoke Rapids, petitioner concealed its intentions, withheld information, and timed the announcement of benefit changes to preclude any meaningful bargaining prior to the announced implementation date. The order is intended to assure that, when petitioner contemplates making benefit changes at Roanoke Rapids similar or identical to those which it proposes to make at its other plants, the Union will have sufficient advance notice to be able to negotiate about those changes before they become an accomplished fact.

[9]Petitioner's reliance (Pet. 16) on *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), is thus misplaced. In that case, the Board ordered the employer to accept a contract term it had not agreed to in bargaining with the union.

petitioner could then petition this Court to review that decision. In short, petitioner's claim "is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); see *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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